

1 Annette W. Jarvis, Utah Bar No. 1649
 2 Steven C. Strong, Utah Bar No. 6340
 3 RAY QUINNEY & NEBEKER P.C.
 4 36 South State Street, Suite 1400
 5 P.O. Box 45385
 6 Salt Lake City, Utah 84145-0385
 Telephone: (801) 532-1500
 Facsimile: (801) 532-7543
 Email: ajarvis@rqn.com

E-FILED on December 11, 2006

7 Lenard E. Schwartzer, Nevada Bar No. 0399
 8 Jeanette E. McPherson, Nevada Bar No. 5423
 SCHWARTZER & MCPHERSON LAW FIRM
 9 2850 South Jones Boulevard, Suite 1
 Las Vegas, Nevada 89146-5308
 Telephone: (702) 228-7590
 Facsimile: (702) 892-0122
 E-Mail: bkfilings@s-mlaw.com

12 Attorneys for Debtors and Debtors-in-Possession

13 **UNITED STATES BANKRUPTCY COURT**
 14 **DISTRICT OF NEVADA**

15 In re:
 16 USA COMMERCIAL MORTGAGE COMPANY,
 Debtor.

Case No. BK-S-06-10725 LBR
 Case No. BK-S-06-10726 LBR
 Case No. BK-S-06-10727 LBR
 Case No. BK-S-06-10728 LBR
 Case No. BK-S-06-10729 LBR

17 In re:
 18 USA CAPITAL REALTY ADVISORS, LLC,
 Debtor.

Chapter 11
 Jointly Administered Under
 Case No. BK-S-06-10725 LBR

19 In re:
 20 USA CAPITAL DIVERSIFIED TRUST DEED
 FUND, LLC,
 Debtor.

Jointly Administered Under
 Case No. BK-S-06-10725 LBR

21 In re:
 22 USA CAPITAL FIRST TRUST DEED FUND, LLC,
 Debtor.

**USA COMMERCIAL MORTGAGE
 COMPANY'S OBJECTION TO
 MOTION TO TEMPORARILY
 ALLOW CLAIM OF BINFORD
 MEDICAL DEVELOPERS LLC FOR
 VOTING PURPOSES**

23 In re:
 24 USA SECURITIES, LLC,
 Debtor.

25 Affects:
 26 All Debtors
 USA Commercial Mortgage Company
 USA Securities, LLC
 USA Capital Realty Advisors, LLC
 USA Capital Diversified Trust Deed Fund, LLC
 USA Capital First Trust Deed Fund, LLC

Date: December 15, 2006

Time: 9:30 a.m.

1 USA Commercial Mortgage Company (“USACM”), by and through its counsel, hereby
 2 files its objection (“Objection”) to the Motion to Temporarily Allow Claim of Binford Medical
 3 Developers LLC for Voting Purposes (“Motion”) filed by Binford Medical Developers LLC
 4 (“Binford”) and moves this Court, pursuant to section 502 of title 11 of the United States Code
 5 (the “Bankruptcy Code”), Rule 3007 and Rule 3018 of the Federal Rules of Bankruptcy Procedure
 6 (the “Bankruptcy Rules”), and Rule 3007 and Rule 3018 of the Local Rules of Bankruptcy
 7 Practice (the “Local Rules”) for an order granting the relief sought by this Objection. In support
 8 of its Objection, USACM states as follows:

9 **I. JURISDICTION**

10 1. The Court has jurisdiction over this Objection pursuant to 28 U.S.C. §§ 1334 and
 11 157. Venue is appropriate under 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding
 12 under 28 U.S.C. § 157(b)(2)(B) and (L).

13 2. The statutory predicate for the relief requested herein is 11 U.S.C. § 502 and
 14 Bankruptcy Rule 3007.

15 **II. BACKGROUND**

16 3. On April 13, 2006 (“Petition Date”), USACM, USA Capital Realty Advisors, LLC
 17 (“USA Realty”), USA Capital Diversified Trust Deed Fund, LLC (“DTDF”), USA Capital First
 18 Trust Deed Fund, LLC (“FTDF” and together with DTDF, the “Funds”), and USA Securities,
 19 LLC (“USA Securities”) (collectively the “Debtors”) filed voluntary petitions for relief under
 20 chapter 11 of the Bankruptcy Code. USACM and the other Debtors continue to operate their
 21 businesses, if any, as debtors-in-possession pursuant to sections 1107(a) and 1108 of the
 22 Bankruptcy Code. Management duties of USACM are conducted by Thomas J. Allison of
 23 Mesriow Financial Interim Management, LLC (“Mesriow”) who serves as the President and Chief
 24 Restructuring Officer.

25 4. On May 10, 2006, the Office of the United States Trustee filed notice indicating
 26 that the Official Committee of Unsecured Creditors of USA Commercial Mortgage Company and
 27 the Official Committee of Holders of Executory Contract Rights Through USA Commercial
 28 Mortgage Company (collectively the “Committees”) had been formed. No trustee or examiner has

1 been appointed.

2 5. On September 14, 2006, the Court entered its Order Setting Deadline to File Proofs
 3 of Claim and Proofs of Interest (the “Bar Date Order”) (Docket No. 1280). The Bar Date Order
 4 established 5:00 p.m., prevailing Pacific Time, on November 13, 2006, as the deadline for
 5 creditors to file proofs of claim (“Bar Date”).

6 6. On September 25, 2006, USACM served a copy of the Bar Date Order on its
 7 service lists (Docket No. 1358).

8 7. On November 16, 2006, the Court entered an order approving, among other things,
 9 the Debtors’ Disclosure Statement and proposed Solicitation Procedures. Thereafter, Solicitation
 10 Packages were sent to all claimants with instructions to file a Rule 3018(a) motion if the claimants
 11 disagreed with the amount or classification of their claims.

12 8. Binford filed a proof of claim on November 9, 2006, claiming an unsecured debt of
 13 \$3,502,383 for “Breach of Contract, Intentional Misrepresentation and other theories in attached
 14 Complaint” (“Claim”). The complaint attached to the Claim (“Complaint”) was filed in Adversary
 15 Proceeding No. 06-1212 commenced against USACM on November 7, 2006 (Docket No. 1752).

16 9. USACM filed its answer (“Answer”) to the Complaint on November 30, 2006,
 17 denying any liability, asserting various affirmative defenses, and requesting the dismissal of the
 18 Complaint. USACM also filed a counterclaim against Binford the same day.

19 10. Binford filed the Motion on November 30, 2006, seeking allowance of its Claim for
 20 voting purposes pursuant to Rule 3018 (Docket No. 1927). Binford’s stated reason for filing the
 21 Motion was due to the fact that it did not receive a ballot with the copy of the Disclosure
 22 Statement. Since filing the Motion, Binford has received a Class A-4 Ballot. Binford also asserts
 23 that it is “undisputed” that USACM is liable for breach of contract.

24 III. APPLICABLE AUTHORITY

25 11. Pursuant to section 502(a) of the Bankruptcy Code, any claim for which a proof of
 26 claim has been filed will be allowed unless a party in interest objects. If a party in interest objects
 27 to the proof of claim, the court, after notice and hearing, shall determine the amount of the claim
 28 and shall allow the claim except to the extent that the claim is “unenforceable against the debtor

1 . . . under any . . . applicable law for a reason other than because such claim is contingent or
 2 unmatured." 11 U.S.C. § 502(b).

3 12. USACM is entitled to object to proofs of claim under section 502(a) of the
 4 Bankruptcy Code.

5 13. A properly filed proof of claim is presumed valid under Bankruptcy Rule 3001(f).
 6 However, once an objection to the proof of claim controverts the presumption, the creditor
 7 ultimately bears the burden of persuasion as to the validity and amount of the claim. *See Ashford*
 8 *v. Consolidated Pioneer Mortg.* (*In re Consolidated Pioneer Mortg.*), 178 B.R. 222, 226 (B.A.P.
 9 9th Cir. 1995), *aff'd*, 91 F.3d 151 (9th Cir. 1996). The ultimate burden of proof as to the validity
 10 of a proof of claim "remains at all times upon the claimant." *Lundell v. Anchor Constr.*
 11 *Specialists, Inc.* (*In re Lundell*), 223 F.3d 1035, 1039 (9th Cir. 2000).

12 14. Bankruptcy Rule 3018(a) provides in relevant part that "[f]or cause shown, . . . the
 13 court after notice and hearing *may* allow the claim or interest in an amount which the court deems
 14 proper for the purpose of accepting or rejecting a plan." Fed. R. Bankr. P. 3018(a) (emphasis
 15 added). It is left to the court's discretion whether to grant a Rule 3018 motion. *See, e.g., In re*
 16 *Marin Town Center*, 142 B.R. 374, 379 (N.D. Cal. 1992); *Armstrong v. Rushton* (*In re*
 17 *Armstrong*), 294 B.R. 344, 354 (B.A.P. 10th Cir. 2003).

18 **IV. OBJECTION TO BINFORD'S MOTION**

19 15. USACM objects to Binford's Motion since the stated purpose for filing the Motion
 20 was Binford's failure to receive a ballot. Binford has received a Class A-4 ballot since the filing
 21 of the Motion so its contention is now moot in that regard.

22 16. USACM, however, has now filed an objection to Binford's Claim. Therefore,
 23 USACM also objects to the Motion to the extent that it is deemed to address USACM's objection
 24 to the Claim.

25 17. USACM has analyzed Binford's Claim and contends that it has no liability on
 26 account of the Claim. In its Answer, USACM denied liability on each of the counts alleged in the
 27 Complaint and continues to assert that it is not liable to Binford. Therefore, Binford's assertion in
 28 its Motion that it is "undisputed" that USACM is liable for breach of contract is without merit.

1 Binford's Claim is not enforceable against USACM and should be disallowed in its entirety.
2 Therefore, Binford should not be allowed to vote and its Motion should be denied.

3 **V. CONCLUSION**

4 For the reasons set forth herein, USACM respectfully requests that the Court enter an order
5 sustaining its Objection to Binford's Motion and disallow Binford's Claim in any amount for the
6 purposes of voting. USACM also requests that the Court grant such other and further relief as it
7 deems just and proper.

8 Respectfully submitted this 11th day of December, 2006.

9

10 /s/ Jeanette E. McPherson

11 Lenard E. Schwartzer, Nevada Bar No. 0399
12 Jeanette E. McPherson, Nevada Bar No. 5423
13 SCHWARTZER & MCPHERSON LAW FIRM
14 2850 South Jones Boulevard, Suite 1
15 Las Vegas, Nevada 89146

16 and

17 Annette W. Jarvis, Utah Bar No. 1649
18 Steven C. Strong, Utah Bar No. 6340
19 RAY QUINNEY & NEBEKER P.C.
20 36 South State Street, Suite 1400
21 P.O. Box 45385
22 Salt Lake City, Utah 84145-0385

23 903948

24

25

26

27

28